

Regulatory Guidance Letter 87-07

SUBJECT: Section 404 (f)(1)(c) Statutory Exemption for Drainage Ditch Maintenance

DATE: August 17, 1987      EXPIRES: December 31, 1989

1. Enclosed for implementation is a guidance statement on the 404(f)(1)(C) exemption for drainage ditches. This guidance was developed by EPA in cooperation with the Corps.
2. This guidance expires 31 December 1989 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

SUBJECT: Section 404(f)(1)(C) Statutory Exemption for Drainage Ditch Maintenance

1. The discharge of dredged or fill material in waters of the United States associated with specific agricultural and silvicultural activities identified in Sections 404(f)(1)(A)-(F) is not prohibited by or otherwise subject to regulation under Section 404, 301, or 402 of the Clean Water Act (CWA) except; (1) as provided under Section 404(f)(2), or (2) if a discharge resulting from a 404(f)(1) activity contains a toxic pollutant listed under Section 307 of the CWA.

2. Section 404(f)(1)(C) specifically provides that dredge or fill discharges for the purpose of maintenance (but not construction) of drainage ditches are exempt under Section 404.

3. Section 404(f)(2), referred to as the "recapture provision," provides that any discharge of dredged or fill material in waters of the United States incidental to the maintenance of drainage ditches (or other activities listed under 404(f)(1)) must be authorized by permit if it is part of an activity whose purpose is to convert an area of the waters of the United States to a use to which it was not previously subject, where the flow or circulation of such waters may be impaired or their reach reduced.

4. In order to conclude that a given discharge activity associated with ditch maintenance is exempt from regulation, it must be determined both that the proposed activity falls within Section 404(f)(1)(C) and that it is not recaptured under Section 404(f)(2).

5. For purposes of determining whether or not a proposed activity falls under the provision for ditch maintenance at 404(f)(1)(C), the following interpretations will apply:

a. maintenance of a drainage ditch means the physical preservation of the original, as built configuration of the ditch. (The District may wish to consider issuance of a General Permit to allow for alteration of ditch side slopes in order to provide Best Management Practices to protect water quality. Such General Permit would allow this construction in association with exempted maintenance so long as the bottom depths and widths of the ditches are not otherwise altered.)

b. maintenance includes the removal of accumulated sediment and debris.

c. Unlike Section 404(f)(1)(A), there is no "ongoing" requirement associated with Section 404(f)(1)(C). However, facts relating to the current use of an area could be relevant under Section 404(f)(2), and therefore pertinent to whether or not an exemption applies.

d. Because the statute clearly does not exempt "construction" of drainage ditches from regulation under the CWA, ditches being built for the dual function of irrigation and drainage are considered drainage ditches and their construction is not exempt.

6. For the 404(f)(2) recapture provision to apply, both the "change in use" requirement and the "reduction in reach/impairment of flow or circulation" requirement must be met.

7. For purposes of determining whether or not the 404(f)(2) recapture provision is triggered, the following interpretations will apply:

a. the discharge of dredged or fill material itself does not need to be the sole cause of the destruction of the waters of the United States (e.g., wetlands) or other change in use or the sole cause of the reduction in or impairment of, reach, flow or circulation of such waters. The discharge need only be "incidental to" or "part of" an activity that is intended to or will foreseeably bring about that result.

b. A discharge of dredged or fill material which converts a Section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States (33 CFR §SM323.4(c)). For purposes of determining whether a discharge associated with the maintenance of a drainage ditch is recaptured under 404(f)(2), it is necessary to determine whether such maintenance activities would convert wetlands to a use to which the area was not previously subject. Determining the previous use requires a case-by-case assessment which applies a rule of reason to the facts. For example, if an area has been farmed following ditch construction and an effort has been made to farm the land within the originally constructed ditch drainage area on a regular but not necessarily continuous basis, the fact that wetland vegetation has temporarily reestablished does not mean that a continuation of farming after ditch maintenance will result in bringing the area under a new use. That is, the temporary establishment of wetland vegetation within an area benefited by original ditch construction does not automatically mean that the use to which the area was previously subject should be considered "wetland." On the other hand, a discharge which results in the farming of wetlands for which there is no reasonable evidence that they were ever farmed or where farming was abandoned following original ditch construction, will be considered a new use even where such land was within the original drainage area. For the purposes of this paragraph, an area will not be considered abandoned where farming has occurred on a regular but not necessarily continuous basis.

c. where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

8. In situations where the potential applicability of a proposed discharge to the exemption under Section 404(f)(1)(C) has been raised to the District, and where the District cannot make a determination due to a lack of pertinent factual information, it is incumbent on those seeking exemption to provide the documentation necessary to establish the facts on a case-by-case basis.